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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JORGE G. ESQUIVELZETA, Plaintiff and Respondent v. ANDREA SOHN, Defendant and Appellant.	B235003 (Los Angeles County Super. Ct. No. BH007981)

APPEAL from an order of the Superior Court of Los Angeles County. Marjorie Steinberg, Judge. Reversed.

Hamar Family Law Corp. and Maria Rivas Hamar; Andrea Sohn, in pro. per., for Appellant.

No appearance by Respondent.

INTRODUCTION

This action arises under the International Child Abduction Remedies Act (ICARA) (42 U.C. § 11601 et seq.). ICARA implements the Hague Convention on the Civil Aspects of International Child Abduction (Convention), a treaty to which the United States and Mexico are contracting states. Appellant Andrea Sohn (mother) and respondent Jorge Esquivelzeta (father) were Mexican citizens living in Mexico City when they married in 2000. They still lived in Mexico when their divorce became final in August 2009. In the interim, they had three children (the children).[1] In March 2010, mother moved with the children to Los Angeles. Alleging mother had done so without his consent in violation of the Mexican divorce decree, father filed an ICARA petition seeking return of the children to Mexico. Mother appeals from the August 5, 2011 order granting father's petition and ordering the children returned to Mexico (the August 5th order). On August 8, 2011, this court stayed the August 5th order. On appeal, mother contends various trial court findings were not supported by substantial evidence. Father has not filed a respondent's brief. We reverse.

"ICARA" OVERVIEW

In *Maurizio R. v. L.C.* (2011) 201 Cal.App.4th 616, 633 (*Maurizio*), the court recently explained: "The Hague Convention provides a mechanism for the prompt return of a child taken by one parent across international borders in violation of a right of custody. (42 U.S.C. § 11601(b)(3)(B); *Abbott v. Abbott* (2010) 560 U.S. __ [130 S.Ct. 1983] (*Abbott*).) '[It] seeks to deter parents from abducting their children across national borders by limiting the main incentive for international abduction—the forum shopping of custody disputes. [Citation.] A court that receives a petition under the Hague Convention may not resolve the question of who, as between the parents, is best suited to have custody of the child. [Citation.] With a few narrow exceptions, the court must

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[1] Mother and the children also have dual German citizenship.

return the abducted child to its country of habitual residence so that the courts of that country can determine custody.' [Citation.] The sole function of an action under the Hague Convention is to determine if the abducted child should be returned to the country of the petitioning (complaining) parent. The action does not govern the merits of custody disputes; those issues must be decided in appropriate proceedings in the child's country of habitual residence. [Citations.] The issue of which placement is best for a child in the long run is not relevant. [Citation.]" (See also *Chafin v. Chafin* (Feb. 19, 2013, No. 11-11347) 2013 U.S. LEXIS 1122 (*Chafin*).)

Under Article 3(b) of the Convention, to be "wrongful," the removal of a child must be both without the other parent's consent and in violation of that parent's custody rights under the law of the state in which the child was a resident before the removal.[2] (42 U.S.C. § 11603(e)(1)(A); *Maurizio, supra*, 201 Cal.App.4th at p. 622, fn. 2.) "[I]n determining whether a parent exercises rights of custody, ' "the law of the child's habitual residence is invoked in the widest possible sense," and . . . the sources from which custody rights derive are "all those upon which a claim can be based within the context of the legal system concerned." ' [Citation.]" (*In re Marriage of Witherspoon* (2007) 155 Cal.App.4th 963, 972-973 (*Witherspoon*).) The petitioner in an ICARA proceeding has the burden of proving by a preponderance of the evidence that the child has been wrongfully removed. (42 U.S.C. § 11603(e)(1)(A).)

Once it finds that a child has been wrongfully removed, the trial court must order the child returned unless it finds a specified exception applies. The only exceptions relevant here are those set forth Articles 12 and 13(b). Under Article 13b, the court is not bound to order a child returned if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." (*Chafin, supra*, 2013 U.S. LEXIS 1122, *8.) The respondent has the burden of proving by clear and convincing evidence that the Article 13(b) exception applies. (42 U.S.C. § 11603, subdivision(e)(2)(A); *Maurizio* at p. 633.) The additional exceptions

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[2] All future references to Articles will refer to the Hague Convention.

found in Article 12 apply only in the case of a petition brought more than one year from the date of the wrongful removal. In such a case, the trial court "shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment." The respondent has the burden of proving by a preponderance of the evidence that the Article 12 exception applies. (42 U.S.C. § 11603(e)(2)(B); *Maurizio, supra*, 201 Cal.App.4th at p. 633.)

With this statutory framework in mind, we proceed to the facts of this case.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and father had three children: sons N. and J. and daughter S. Father moved out of the family home sometime in late 2007. N. was eight, J. was four and S. was two when the couple's divorce was finalized in August 2009. The Mexican divorce decree granted custody of the three minor children to mother, gave father visitation rights, required both parties to give 15 day's notice of any change of domicile and to "report to one another immediately on any matter related to the minor children."

Mother moved with the children to Los Angeles in March 2010; the parties dispute whether father had prior notice and consented to the move. According to father he did not know about the move, much less consent to it, and he did not know the whereabouts of the children and mother until they were eventually located by the United States Department of State (the "Central Authority" of the United States under the convention).[3] In January 2011, the Los Angeles District Attorney received a Hague Convention application requesting that it locate the minor children and return them to Mexico. On May 3, the District Attorney petitioned for a warrant in lieu of a writ of habeas corpus, alleging that father had not consented to the move and mother had abducted the children in violation of the Convention. Mother opposed the petition on the grounds that the Hague Convention did not apply because the children were not wrongfully removed;

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[3] Article 6 requires each country to designate a "Central Authority" for the purpose of discharging certain specified functions. (42 U.S.C. § 11606.)

husband had no custody rights, only a right of access to the children; Mexico was not the children's habitual residence; and even assuming the Hague Convention generally applied, this case fell within the exceptions for grave risk of harm, "well-settled," and the objection of the child.

Pending trial on the petition, father was given monitored visits with the children. A clinical social worker was appointed to interview the children about any abuse or domestic violence, whether the children objected to being returned to Mexico with or without mother and the children's attachment to friends and relatives in the United States.

A. Trial

1. The Social Worker

The social worker testified that she interviewed the children at the courthouse earlier that day. Ten-year-old N. was mature for his age. He "readily told [the social worker] about the abuse that he experienced by father. He said he was very sad and he cried when he witnessed his father hitting him, as well as his younger brother with a belt." N. said that father sometimes hit J. until J. vomited. When father hit the boys, mother would yell, "Stop it. Stop it." N. also witnessed father push mother away when she tried to embrace him. N. said that he did not ever want to see father again because father hit him and J. Six-year-old J. confirmed that father hit him and N. with a belt, and pushed mother. Four-year-old S. had more difficulty focusing on questions, but confirmed that father hit her brothers. S. recalled an incident in which father pushed her out of a chair. N. was not clear on when the last incident of abuse occurred, but the social worker deduced that it occurred while mother and father still lived together in Mexico.

None of the children had anything positive to say about father. The social worker testified that, based on her experience interviewing hundreds of children, she found them credible. She was confident that they had not been coached by either parent and nothing indicated mother spoke negatively about father to the children. In fact, N. told the social worker that they rarely talked about father because it was "bad memories" for the family.

The children felt very safe living with mother and N. stated he did not feel safe living with father in Mexico.

All three children had made a smooth transition to life in Los Angeles. N. missed Dario, his friend in Mexico, but J. and S. did not really remember anything about their school in Mexico. N. told the social worker that he liked his new school and did very well in the fourth grade. As an avid reader he particularly liked the books he got in school here and did not want to go back to Mexico because his school there did not provide him with as many books. N. listed the names of the many friends he had made here and with whom he had play dates. J. also liked living in Los Angeles. He had completed kindergarten and was "very attached to his friends there." J. was looking forward to starting first grade. S. had attended a pre-school. The social worker concluded that the children had "adjusted quite well in the year and a half or so that they had been in the United States. They made friends, they are very verbal. They seem to have a lot of energy. And when talking about school, they feel very wanted there and loved at school."

2. Mother

Mother testified that father was emotionally and physically abusive to her during the marriage, sometimes in the children's presence; the abuse began when she was pregnant with N. and continued even after they separated. Father was also physically and emotionally abusive to the children. After they separated, father rarely saw the children. After divorce proceedings began, mother obtained a restraining order against father. Mother and N. told the Mexican court about father's abusiveness. Based on those accusations, the Mexican court ordered a psychological evaluation. The evaluator found that there had been no "direct attack or assault" on any of the children. Mother concluded the Mexican court could do little to protect her and the children and, for this reason, she signed the agreement giving mother custody and father unmonitored visits with the children. Mother did so with the understanding that father agreed to her

eventually moving with the children to the United States. When father began unmonitored visits with the children, he rarely gave mother the advance notice called for in the agreement. Father often brought the children home late at night or in the very early hours of the next day. On these occasions, mother would try to call father on his cell phone but he would not answer. The children resisted visiting father – if they heard his car arrive, they would often hide in mother's house and had to be forced to go with father. When they returned from visits with father, the children acted out.

Mother had a degree in dance theater from the University of London. In late November 2009, after they were divorced, mother discussed with father her intention to apply for a work-study program at a dance school in New York and move there with the children; father approved of the plan. Mother traveled with the children to New York for an interview and was offered the job. In February 2010, father went with mother to get a passport for S. so that mother could take her to New York. After mother was offered another desirable dance-related job in Canada, father met her at a notary to sign the necessary paperwork to obtain visas for the children to go to Canada. But while at the notary's office, father suddenly changed his mind. He went into a rage and as they were leaving the notary's office father threatened to kill mother.

Mother later decided to go to Los Angeles instead of New York. Father came to mother's home on March 23 while the movers were packing up the house. Mother was talking on the phone with father's first cousin, Alice Franco, who lived in Los Angeles. Mother told father she planned on staying with Franco. Father did not object and confirmed that he had Franco's telephone number and the email address he had set up for mother several years before; father would not give mother his email address. After mother left for Los Angeles, father never called or emailed her. Once in Los Angeles, mother obtained a driver's license, registered a car, got an apartment, obtained utility service for the apartment and registered for courses, all in her own name.

Mother and the children all had student visas (mother was studying dance and music at El Camino College) and mother was in the process of applying for a work permit. Meanwhile, she was supporting herself and the children on her savings and with

help from her family. In Mexico, N. and J. attended the private German School (paid for by the children's maternal great-grandfather) and S. attended a preschool. In Los Angeles, N. and J. attended a public elementary school in Torrance. In mother's opinion, the children's public school was superior to their Mexican private school in the way the teachers interacted with the students and the way the children responded. Although he had been in the second grade in Mexico, N. tested so well that he was put in the fourth grade in his new public school where he excelled academically. N. also participated in intramural sports and other school activities; he played piano and had been invited to sing in the El Camino College Children's Choir. J. had been in kindergarten in Mexico, which was equivalent to pre-school in California in that attendance was voluntary. But the kindergarten curriculum in his new public school was very demanding and J. was not as good a student as N., so his teachers and mother agreed that he would repeat kindergarten the next year. J. had made great progress in his first year of school in Los Angeles. J. was athletic and liked gymnastics. He was also very popular, had a lot of friends, got invited to parties and mother took him on play dates. S. was doing "great" in school and also had a lot of friends with whom she played on the playground and at play dates. In school, J. created a book entitled, "My Kindergarten Memory Book," which was admitted into evidence as Exhibit F. J.'s book included a photograph of J. with the words, "I'm lucky because I'm safe." S. created a similar book which was admitted into evidence as Exhibit G. Exhibit H included photographs of the children at two birthday parties; one at the zoo and another at a bowling alley. When the children were not in school, mother took them to the swimming pool in their apartment complex where they played with neighborhood children, as well as to the library and a nearby park where they also played with friends. Mother is afraid to return to Mexico because of father's past violence towards her and the children, including threats to kill her.

3. Father

Father, a pilot for Mexican Airlines, denied committing any domestic violence against mother or the children. He admitted criticizing mother's cleaning, but not her

cooking. He recalled spanking N. and J. on one occasion each. Father did not recall teaching N. the "Heil Hitler" sign. Father rarely saw the children during the first 10 months after he moved out of the family home (November 2007 through August 2008), but blamed mother for making it difficult for him to do so. From December 2008 until August 2009, father's visits were monitored after mother accused him of substance abuse. In March 2009, a restraining order was issued against father after N. told the judge that father hit him and J.

After they separated, father encouraged mother to sell the family home and get a paying job (mother was a professional ballerina). In November 2009, mother took the children to New York where she had a job interview. Father was flying at the time and only learned of the trip when he came home. In February 2010, father signed something allowing S. to obtain a passport (N. and J. already had Mexican and German passports). Mother wanted to take the children to New York and Canada during their 2010 spring break, but at a meeting at the notary's office on March 24, 2010, father refused to sign a letter allowing her to do so unless the document specified a return date. Mother showed father Aeromexico tickets to New York which she had already purchased. When he still refused to sign, mother cried. The next day, father went to N.'s school and asked N. if he knew what mother was trying to do. The day after that, March 26, father went back to the school and discovered that N. and J. were not there. There was no answer on mother's home and cell phones and no one was at the house. Father put on his pilot's uniform and went to the airport where he told the airport personnel not to allow mother to leave because she did not have his permission. A few days later, he asked the neighborhood police to help him get into mother's house but they said they could not do it without a court order. Mother did not give father 15 day's advance notice of her intention to move with the children to Los Angeles, as required by the divorce decree and never called to tell father where she and the children were living (while at the notary's office, mother asked for father's email address, but father refused to give it to her). Father denied being at mother's home while she was packing for the move in late March

and denied talking to Franco on the telephone that day. At the time, he had not been on speaking terms with Franco for two years.

Believing mother may have taken the children to Europe, father contacted his brother in England and asked him to help locate them. Father also hired a private investigator. Father first learned that mother was in Southern California in July 2010, when his support checks were cashed at banks there. In September 2010, father stopped making support payments on the advice of his lawyer. Father filed a petition under the Hague Convention on the Civil Aspects of International Child Abduction for return of the children to Mexico. In January 2011, father learned that mother and the children were living in Los Angeles.

4. Alice Franco

Franco saw father hit and kick the children, and push mother. She heard father call mother names. Franco had not had any contact with father since October 2008, but she stayed in frequent contact with mother. On March 23, 2010, Franco called mother at her home in Mexico City. Mother said she was packing and that there were boxes around the house. During the conversation, father arrived at the house. Franco heard mother and father discussing mother's trip to Los Angeles. Mother put the phone on speaker and father said, "They're actually doing it." Father asked Franco to pick up mother and the children at the airport in Los Angeles. Mother later told Franco that father changed his mind and threatened to kill mother if she tried to leave the county so mother drove to Los Angeles instead of flying. When mother and the children arrived in Los Angeles on March 30, they stayed with Franco for about a month. Although father had Franco's contact information, including her email address, he never contacted her about mother or the children.

5. Georgina Cordero

Cordero, mother's friend, began noticing mother's bruises in 2000, before any of the children were born. At the time, Cordero thought nothing of it. But when N. was

about three years old, Cordero started noticing bruises on him, too. On one occasion Cordero saw father kick N. and on another she saw father slap N.'s face. When J. was two years old, Cordereo noticed a bruise on his eye. N. appeared nervous when father picked him up and he was becoming aggressive. Once, when father went to hug S., Cordero heard N. say, "No, don't touch her," or "No, don't harm her." Cordero told mother that there were places she could go if she did not feel safe. Mother cried and told Cordero not to worry.

6. Trina Esquilvelzeta and Julieta Corona

Esquilvelzeta and Corona were father's sisters-in-law, married to father's two brothers. Esquilvelzeta, who lived in England, last saw mother and the children when N. was just a few years old, on the occasion of a visit to Mexico City. Before then, Esquilvelzeta saw mother and the children in England on occasion. Mother never complained to Esquilvelzeta that father was abusive and she never observed bruises on mother. She never observed father being abusive toward the children. The children did not seem afraid of father and their interactions with him seemed normal.[4]

Corona, who lived in Mexico City, testified that she never saw any injuries on mother or the children. Corona saw father and the children three or four times in Fall 2009 and another three or four times in Spring of 2010, when father brought them to her home for a visit. Father's relationship with the children was excellent. Corona's husband does not beat her.

7. Dr. Frederico Vasquez Guerrama

Guerrama had been the children's pediatrician in Mexico since J. was born. Mother, father and all three children usually came to office visits together. Guerrama estimated he saw the children about once a month. They seemed happy and he was never

[4] Mother testified that Esquivelzeta told mother she did not like mother because mother was German and Esquivelzeta's father had fought against Germans in the War.

concerned that they were being physically abused. He never heard father insult mother. Guerrama last saw the children in February 2009.[5]

B. The August 5th Order

The trial court granted father's petition for return of the children to Mexico. That Mexico was the children's habitual residence was undisputed. The trial court found that the Mexican divorce decree gave father custody rights, father did not consent to the children moving to Los Angeles and mother did not establish any defense to the wrongful removal of the children from Mexico. It continued the matter to August 9 for determination of whether mother, who still had physical custody under the Mexican divorce decree, would accompany the children on their return to Mexico, or whether father would take them. On August 8, this court issued a temporary stay of the August 5th order. Mother timely appealed the August 5th order.[6]

DISCUSSION

A. Standard of Review

On appeal, interpretation of ICARA and the trial court's application of the Convention to the facts are both legal questions, which we review de novo. (*Maurizio,*

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[5] Mother testified that she took the children to Guerrama for vaccinations only. Since father accompanied her to those appointments, she did not feel safe telling him that father was physically abusing the children. When father was flying, mother took the children to a neighbor doctor who she trusted. The other doctor never reported the abuse to Mexican authorities because that is something that is not done in Mexico.

[6] On December 8, 2011, we denied father's motion to dismiss the appeal. Mother's Opening Brief was filed on June 25, 2012. On July 2, 2012, this court granted father's counsel's leave to withdraw but denied her request for an extension of time for father to file a Respondent's Brief. An issue as to whether father was properly served with notice of his counsel's withdrawal and notice of default for failure to file a Respondent's Brief caused this court to take oral argument off calendar and give father additional time to file a Respondent's Brief. Father has not filed a Respondent's Brief.

supra, 201 Cal.App.4th at p. 634; *Blondin v. Dubois* (2nd Cir.2001) 238 F.3d 153, 158 (*Blondin II*).) California courts disagree whether the trial court's factual determinations are reviewed for "clear error" under the federal standard, or "substantial evidence" under the California standard. (*Maurizio* at p. 633, citing *Escobar v. Flores* (2010) 183 Cal.App.4th 737, 748 (*Escobar*) [clear error]; *Witherspoon, supra,* 155 Cal.App.4th at p. 971 (*Witherspoon*) [clear error]; *In re Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1213 [substantial evidence].) The standards are similar, but not identical.

"Under the federal standard, ' "[a] finding is 'clearly erroneous' [only] when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ' [Citation.]" (*Escobar, supra,*183 Cal.App.4th at p. 748.) Under California's substantial evidence standard, "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion. [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873; see also *People ex rel. Brown v. Tri–Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567 [substantial evidence standard of review "calls for review of the entire record to determine whether there is any substantial evidence, contradicted or not contradicted, to support the findings below. We view the evidence in the light most favorable to the prevailing party . . . [Citations.]"].)

We need not resolve the issue of whether the federal or California standard applies here because our conclusions as to the sufficiency of the evidence would not vary under either standard. (See *Maurizio, supra,* 201 Cal.App.4th at p. 633.)

B. Sufficiency of the Evidence

1. There Was Insufficient Evidence That Father Had Custody Rights

Mother contends the finding that father had custody rights to the children, a prerequisite to application of the Convention, was not supported by substantial evidence. She argues that the Mexican divorce decree gave mother all custody rights and father only right of access. We agree.

The Convention distinguishes between a "right of custody" and a "right of access." It defines "right of access" as "the right to take a child for a limited period of time to a place other than the child's residence." (Art. 5(b).) By contrast, it defines "right of custody" as "includ[ing] rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." (Art. 5(a).) The distinction is important because, although the Convention recognizes a "right of access," there is no return remedy for a breach of that right. (*Abbott, supra*, 130 S.Ct. at p. 1989.) The return remedy is available only for "wrongful removal" of a child, which the Convention defines as removal in breach of a parent's "rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal . . . ." (Art. 3a.) Because the petitioner in an ICARA proceeding has the burden of proving by a preponderance of the evidence that removal was wrongful (§ 11603(e)(1)(A)), the petitioner necessarily has the burden of proving by a preponderance of the evidence that he or she has a right of custody.

In determining whether a parent has a right of custody, the court consults the law of the country from which the child was removed, in this case Mexico. (See *Abbott, supra*, 130 S.Ct. at p. 1990 [consulting Chilean law to decide whether petitioner had custody right].) "Custody law in Mexico is based on the concept of "*patria potestas*" . . . which is: 'The parents' responsibility to care for the child, reside with the child, and provide for the child's necessities, including food, education and development.' . . . By law, the right to *patria potestas* belongs to both parents, but the exercise of the right, by necessity, normally involves one decision-maker. Concurrence or agreement is not

required." (*Ramirez v. Buyauskas* (E.D. Pa. Feb. 24, 2012, No. 11-6411) 2012 U.S. Dist. LEXIS 24899 (*Ramirez*); see also *A.A.M. v. J.L.R.C.* (E.D.N.Y. 2012) 840 F.Supp.2d 624, 634.)

Under the doctrine of *patria potestas*, both parents must consent to removal of the child from the country. This aspect of *pastria potestas*, known as a *ne exeat* right, gives both parents the right to veto the other parent's desire to remove the children to another country. (*Ramirez, supra*, 2012 U.S. Dist. LEXIS 24899, *41.) In *Gonzalez v. Gutierrez* (9th Cir. 2002) 311 F.3d 942, 954, the Ninth Circuit held: (1) where there is a custody agreement, the Mexican legal concept of *patria potestas* does not establish rights of custody contrary to the provisions of that agreement; and (2) a *ne exeat* clause in a custody agreement gives the vetoing parent a right of access, not a custody right. *Gonzalez's* second holding was abrogated by the United States Supreme Court in *Abbott*, which held that a *ne exeat* right is a right of custody under the Convention, not just a right of access. (*Id.* at p. 1990; but see *id.* at p. 1997 (dis. opn. Stevens, J.).) In *Abbott*, the issue was application of Chilean statutory law, which gave a parent with court-ordered visitation rights a *ne exeat* right. But *Abbott* did not overrule the *Gonzalez* holding that a parent can enter into a custody agreement that relinquishes his or her *patria potestas* rights, including the *ne exeat* right. Even after *Abbott*, courts continue to recognize that *patria potestas* can be terminated by a divorce decree. (See e.g. *Ramirez, supra*, 2012 U.S. Dist. LEXIS 24899, *39-40 [*patria potestas* can be terminated by a divorce decree]; *Castro v. Martinez* (W.D. Tex. 2012) 872 F.Supp.2d 546, 554 [in the absence of a formal custody agreement, the petitioner's right of custody is based on the laws of the country from which the child was removed].) Thus, an ICARA petitioner must show either that the custody agreement gives him or her custody rights, or that the statutory law of the state from which the child was removed gives him or her such rights notwithstanding the custody agreement. Once a right to custody has been established, a showing that the petitioner kept or sought to keep some sort of regular contact with the child is enough to establish that the petitioner was exercising his or her custody rights at the time of removal. (*Tsai-Yi Yang v. Fu-Chiang Tsui* (3rd Cir. 2007) 499 F.3d 259, 277.)

Here, the Mexican divorce decree (an English translation of which is included in the record) includes the following "Considerations of Fact" relating to custody:

> "FIRST: – Both divorcing parties agree that the protection and custody of [all three children] be entrusted to [mother]."
>
> "FOURTH: – [Mother] undertakes to allow [father] to spend time with his minor children . . . any day of the week on two day's advance notice and agreement between the parties . . . within a time Schedule of from fifteen to nineteen hours, collecting and delivering his minor children to the domicile whereat their care and custody are exercised. . . . [Father] will also be entitled to have his minor children remain with him one weekend every month . . . collecting said minors on Saturday at eleven hours and returning them to the domicile where they live at twenty hours, collecting them on the following Sunday at eleven hours and returning them at nineteen hours that same Sunday. As regards the vacation periods of his minor children, these will be divided into two equal parts, the children spending the first period [with mother] and the second period [with father], alternately, on the understanding that during the present year the children will not spend the night at the domicile of their father. Not so the following year, when they can spend the night with [father] both in the vacation periods and during the weekends."
>
> "FIFTH. – The divorcing parties agree to advise any change in domicile within fifteen [day's] advance notice, and also to report to one another immediately on any matter related to their minor children."

Although the Mexican divorce decree was silent on the question of whether father had a *ne exeat* right to veto mother's ability to change the children's domicile, the trial court concluded that the advance notice provisions were sufficient to establish father's *ne exeat* rights under the Mexican law's doctrine of *patria potestas* because nothing in the agreement suggested that father "was in any way waiving or agreeing to forgo what would otherwise be his rights under Mexican law to prevent the removal of the children from Mexico on a permanent basis. [¶] In fact, the agreement or judgment seems to

contemplate that the children will be remaining in Mexico, and any change in their domicile is to be the subject of notice – advance notice by one party to the other. So under the *Abbott* case – and it appears that the court must find that [father] was exercising custodial rights at the time the children were removed in March of 2010."

The trial court's finding is not supported by the evidence. The custody agreement unambiguously entrusted mother with exclusive "custody and protection" of all three children. It gave father a right of access but only "on two day's advance notice and agreement between the parties . . . ." At best, the mutual 15-day notice provision regarding any change of address gave both parties an opportunity to go to court to try to prevent the other party from moving. It did not give either party the power to unilaterally veto the other's decision to move. Accordingly, father did not have any *ne exeat* rights and, therefore, had no custody rights. Because father had no custody rights, mother's removal of the children was not "wrongful" within the meaning of the Convention even if it violated father's access rights. Because removal was not wrongful, father is not entitled to return of the children under the Convention.

Our conclusion that removal was not wrongful because father had no custody rights makes it unnecessary for us to consider whether substantial evidence supports the finding that father did not consent to the move.

2. Even If Removal Was Wrongful, the Trial Court's Finding That the Children Were Not "Settled" Within the Meaning of the Article 12 Exception Was Not Supported By Substantial Evidence

Mother contends insufficient evidence supported the trial court's finding that the children were not settled in Los Angeles within the meaning of the Article 12 exception to mandatory return. She argues that the children's age, stability and duration of their time in Los Angeles, consistent school attendance, friends and relatives in Los Angeles, participation in extracurricular activities and mother's employment in Los Angeles established that the exception applies. Assuming for the sake of argument that removal

was wrongful, we agree with mother that the trial court's finding that the children were not well settled was not supported by the evidence.

Because father's ICARA petition was filed more than one year after mother removed the children from Mexico, under Article 12, the trial court had discretion to not order the children returned to Mexico if mother showed that they are so settled here that, " 'at least inferentially, return would be disruptive with likely harmful effects.' [Citation.]"[7] (*In re Koc* (E.D.N.Y. 2001) 181 F.Supp.2d 136, 152.) In *In re B. Del C.S.B.* (9th Cir. 2009) 559 F.3d 999, 1003 (*C.S.B.*), the Ninth Circuit explained, "The rationale behind Article 12's 'now settled' defense is that when 'a child has become settled and adjusted in [his new environment, a] forced return might only serve to cause him or her further distress and accentuate the harm caused by the wrongful relocation.' Beaumont & McEleavy, *The Hague Convention on International Child Abduction 203* (1999); see also Perez-Vera Report ¶ 107 (explaining that 'it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it . . . .')." The "settled" exception is narrow and even where it applies, the trial court has discretion to order repatriation. (*See Filipczak v. Filipczak* (*In re Filipczak*) (S.D.N.Y. 2011) 838 F.Supp.2d 174, 181 (*Filipczak*) [A showing that the child is settled " 'may be a sufficient ground for refusing to order repatriation,' but it does not compel that result. [Citation.]".)

Neither the Convention nor ICARA defines "settled" and no California case has addressed the issue. The federal trial courts have developed a list of factors to be considered, all of which "bear on whether the child has 'significant connections to the new country.' ([Text & Legal Analysis of Hauge International Child Abduction Convention,] 51 Fed.Reg. at 10509 [(U.S. State Dep't Mar. 26, 1986)].)" (*C.S.B., supra*, 559 F.3d at p. 1009.) The Ninth Circuit articulated the factors to be considered in

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[7] In the trial court, father argued that the one year period for mandatory return should be tolled because mother concealed the children's whereabouts. On appeal, mother argues that equitable tolling is not applicable. Inasmuch as the trial court did not apply the equitable tolling doctrine and father has not filed a Respondent's Brief arguing that this was error, we need not decide the issue.

determining the issue: "(1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability." (*Ibid.*) According to the Ninth Circuit, the most important factors are the length and stability of the child's residence in the new environment. (*Ibid.*) The courts that have considered the issue have come to different conclusions on relatively similar facts. We briefly summarize those cases.

i. Cases Finding Sufficient Evidence That A Child Is "Settled"

The common thread that runs through the cases that have found the Article 12 exception applicable, is that the children have lived in the same place since coming to the United States, have attended the same school, and as a result have formed relationships here. For example, in *Lozano v. Alvarez* (S.D.N.Y. 2011) 809 F.Supp.2d 197, 230-231 (*Lozano*), the court found the Article 12 exception applicable where the five-year-old child had become close to the family members she had been living with for 16 months, was attending kindergarten at the same school that she had attended for pre-kindergarten, was progressing socially and academically in school, played with friends after school, attended ballet class and church and told interviewers that she was happy in New York. (See also *Castillo v. Castillo* (D.Del. 2009) 597 F.Supp.2d 432, 440-441 [child had one residence and one school since arriving in the United States]; *Silvestri v. Oliva* (D.N.J. 2005) 403 F.Supp.2d 378, 388 [children had moved just once and had remained in the same school system since coming to the United States]; *Zuker v. Andrews* (D.Mass. 1998) 2 F.Supp.2d 134, 141 [the four-year-old child had attended the same daycare for more than a year, had thrived academically and socially, had playdates and had established relationships with his teachers and grandmother]; *Application of Wojcik v. Wojcik* (E.D.Mich. 1997) 959 F.Supp. 413, 421 [children had lived in just two residences during the 18 months they had been in the United States, had attended school or daycare

consistently, had friends, attended church regularly]; *Application of Robinson* (D.Colo. 1997) 983 F.Supp. 1339, 1345-46 [children had lived in two home in the same area over 22 months, were doing well in school, actively participated in extracurricular activities and had made friends in school and elsewhere].)

ii. Cases Finding Insufficient Evidence That A Child Is "Settled"

By contrast, the common denominator among the cases in which the Article 12 exception has been found inapplicable is that the children had lived in multiple places and attended more than one school since coming to this country. For example, in *Filipczak, supra*, 838 F.Supp.2d 174, the children were four and almost three years old when the respondent brought them from Poland to the United States. They lived briefly in a domestic violence shelter in Chicago, then an apartment in Manhattan, and finally settled with the respondent's fiancé in New Haven, Connecticut. Finding the Article 12 exception inapplicable, the court noted that the children had lived in multiple cities and attended multiple schools since coming to the United States; although they adapted well to life here, they were so young that they would likely adapt equally well to living in Poland again; they had extended family in Poland; and although they did not speak Polish, they could learn. (See also *In Re S.E.O.*, *supra*, 873 F.Supp.2d at pp. 544-545 [since their wrongful removal from Turkey, the children had spent weeks visiting the petitioner in Turkey while the ICARA application was pending]; *Wigley v. Hares* (2011) 82 So.3d 932 [2011 Fla. App. LEXIS 11786] [10-year-old child had lived in the same house for four years but had not attended school or been properly home-schooled; had not participated in community activities, sports, or church; had limited access to friends and other family members; the mother was undocumented and was not employed]; *Giampaolo v. Erneta* (N.D.Ga. 2004) 390 F.Supp.2d 1269, 1282-1283 [11-year-old child had regularly attended school, participated in extracurricular activities and made friends but had lived in three different homes since arriving in the United States, parent and child were undocumented, had virtually no family here and would be living with the respondent's husband, who was a convicted felon]; *In re Ahumada Cabrera* (S.D.Fla.

2004) 323 F.Supp.2d 1303, 1313-1315 [nine year old child had changed schools once and residences five times]; *In re Koc, supra,* 181 F.Supp.2d at pp. 153-154 [eight-year-old child had lived in three different locations and attended three different schools].)

3. The Trial Court's Finding that the Children Were Not "Settled" Is Not Supported By the Evidence

Here, regarding the Article 13(b) exception, the trial court found: "The children are certainly settled here. Whether they're well settled – they spent a school year here. They would be starting a new school year. If they went back to Mexico, we would not be taking them out of school. [¶] I did hear some testimony about they have a good school and some friends, but not a lot about friends and relatives, et cetera, here. So I'm going to decline to take advantage of that particular defense to return, even though this petition was filed slightly over one year from the date of the removal. [¶] I do not find that they're sufficiently well settled, by virtue of that additional six weeks, all of which have been now in the summertime, that it would be improper to send them back to Mexico."

The trial court's finding that the children were not sufficiently settled to trigger the Article 13(b) exception is not supported by the evidence. On the contrary, the evidence was undisputed that mother and the children lived with Franco, a paternal first cousin, during their first month in Los Angeles, but since then had lived in the same apartment. Franco remained in daily contact with the family. In the one school year the children had lived in Los Angeles, N. and J. had attended the same public school and S. had attended the same pre-school. In addition to excelling academically, N. played intramural sports, took piano lessons and sang in a choir. J. was less academically accomplished than N., but he had made a lot of progress in his new school and was very popular. S. had done well in her pre-school. All three children had made friends at school and in the neighborhood with whom they socialized at the park, at the swimming pool and on play dates. The social worker testified that N. listed the names of his many friends here. J. was attached to his friends and was looking forward to the next school year. N. did not want to go back to school in Mexico because it did not have the same resources as his

school in Los Angeles. J. was happy because he felt "safe." According to the social worker, "when talking about their school, [the children] feel very wanted there and loved at school." The only reasonable conclusion from this evidence is that the children were settled in Los Angeles and that returning them to Mexico would be disruptive with likely harmful effects. (See *In re Koc*, *supra*, 181 F.Supp.2d at p. 152.)[8]

DISPOSITION

The judgment is reversed. Each party shall bear their own costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.

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[8] The trial court distinguished between children who were "settled" and who were "well settled." Article 12 of the Convention uses the word "settled" although some of the cases utilize "well settled." (See e.g., *Duarte v. Bardales* (9th Cir. 2008) 526 F.3d 563, 569.) To the extent there is a difference between the two, the only reasonable inference from the evidence is that the children were both settled and well settled in California.